BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TABITHA L. SIZEMORE	)	
Claimant	)	
	)	
VS.	)	
	)	
JEZEBEL'S	)	
Respondent	)	Docket No. 1,021,164
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the December 9, 2005 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on March 17, 2006.

APPEARANCES

Russell B. Cranmer of Wichita, Kansas, appeared for the claimant. Michael D. Streit of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined claimant was respondent's employee and suffered injuries arising out of and in the course of her employment. Accordingly, the ALJ awarded claimant medical compensation and permanent partial disability compensation based upon a 5 percent whole person functional impairment.

The respondent requests review of whether the claimant is an employee or an independent contractor and whether the claimant's injury arose out of and in the course of employment with the respondent.

Respondent argues the claimant has failed to sustain her burden of proof that her injuries arose out of and in the course of employment; that there was no employee/employer relationship and claimant failed to provide timely notice of the accident. Respondent further argues that claimant is an independent contractor because the respondent does not pay the dancers and does not have control over the dancers.

Conversely, claimant argues the respondent controlled what days she worked, what hours she worked, and imposed fines when she was late to work or did not work a scheduled day. And until the fines were paid she could not return to work. Claimant further argues the respondent's right to control was sufficient to establish the relationship of employer and employee and the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury on December 31, 2004, while she was working as a dancer at respondent's club in Wichita, Kansas. Claimant started working as a dancer with respondent beginning September 15, 2004, after the parties signed a contractual agreement, which is identified as a license agreement.[1] In that agreement, claimant agreed to dance at respondent's establishment, although without any monetary compensation from respondent. But claimant was allowed to keep all gratuities she received from respondent's customers while dancing. The terms of the license agreement specify that claimant is an independent contractor and not an employee, and that respondent will not be responsible for state, federal income or FICA taxes with regard to the gratuities received by claimant.

Claimant was required to provide all of her own equipment, including music, sound equipment and dance costumes. If claimant worked during the afternoon she was directed to wear a gown but otherwise selected her own dance costumes. However, respondent did provide the opportunity for claimant to rent dance music and sound equipment as well as gowns from respondent. Claimant was obligated to avoid any illegal activities during her dancing and required to follow all city, county and state laws with regard to her dancing activities.

Claimant alleges that on December 31, 2004, while dancing, an intoxicated patron threw a pitcher of beer at her, striking her on the leg. The beer spilled on the dance floor

[1] P.H. Trans., Resp. Ex. 1.

and claimant, who was wearing stiletto heels at the time, slipped, grabbing the dance pole to keep herself from falling to the floor. Claimant testified to feeling a minor sensation at that time, but experienced no significant pain. However, the next morning, claimant felt significant pain.

Claimant first sought medical treatment with Dr. R. Jerry DeGrado, on January 3, 2005. At that time, she had low back pain. Claimant was off work until January 7, 2005, at which time Dr. DeGrado released claimant to return to work. Claimant appeared at the Wesley Medical Center emergency room on January 20, 2005, reporting that she awoke that morning unable to move her legs. The medical reports indicate claimant's legs felt like dead weight. The January 20, 2005 medical report indicates that claimant cleaned her house the night before without any pain or problems, but awoke that morning with significant difficulties.

Claimant underwent conservative medical care at Wesley Medical Center, undergoing an MRI which displayed a mild disk bulge at L5-S1. The MRI indicated a central bulge, with no canal compromise and minimal loss of L5-S1 disk space height.

Claimant has terminated her contract with respondent. She explained that she had not returned to work for respondent because she had been fined for missing work while receiving medical treatment and she could not afford to pay the fines in order to return to work.

Respondent's representative Lisa Ward, who was identified as respondent's manager, testified in this matter regarding claimant's allegations of a work-related accident. She testified that claimant signed the agreement as an independent contractor and not an employee. Respondent was not responsible for taking out employment taxes and only directed claimant to appear at the time she was scheduled and not violate any local or state laws with regard to her dancing activities. Ms. Ward testified that the first time she was made aware of claimant's allegation of a fall or near fall on stage was at the time of the preliminary hearing on March 8, 2005.

Ms. Ward acknowledged that dancers who do not show at their designated times are fined or docked, but she went on to state that there is no way for respondent to force them to pay, as they were not employees. They would simply ask the dancer to leave and not return, should a difficulty with scheduling arise.

Ms. Ward also testified that the disc jockey who plays for the various dancers keeps a running log of when the dancers are scheduled and when they actually dance, since he is the one responsible for providing their dance music, should they be so inclined to use his equipment and materials. On December 31, 2004, the day claimant alleges an injury, Ms. Ward testified that claimant was listed as a no-show, having failed to appear at her

designated dance time. At regular hearing, the claimant testified she had no sales or lap dances on the accident date and that is why the records appeared to indicate she did not work that date. Ms. Ward then noted that claimant was absent until January 7, 2005, at which time claimant purchased an outfit, but there was nothing recorded to indicate that claimant danced on January 7. The record is unclear when or if claimant next appeared at respondent's establishment to dance.

The parties, by stipulation, offered as evidence a form, Employment Verification Request, the claimant had received from the Kansas Social and Rehabilitation Services. The form was filled out by respondent's manager, Lisa Ward. It confirmed claimant was paid daily as she worked for tips and that she did not receive a check or benefits from respondent. Claimant is currently working as an accountant for a realty company.

The Board, after considering the entire evidentiary record again concludes claimant was an independent contractor. In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[2]

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are elements pertaining to both relationships which may occur without being determinative of the relationship.[3] There is no absolute rule for determining whether an individual is an independent contractor or an employee.[4] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[5]

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[6]

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[2] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[3] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[4] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

[5] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[6] *Wallis* at 102-103.

In addition to the right to control and the right to discharge the worker, the other commonly recognized tests of the independent contractor relationship are:

1. The existence of a contract to perform a certain piece of work at a fixed price.

2. The independent nature of the worker's business or distinct calling.

3. The employment of assistants and the right to supervise their activities.

4. The worker's obligation to furnish tools, supplies and materials.

5. The worker's right to control the progress of the work.

6. The length of time that the worker is employed.

7. Whether the worker is paid by time or by job.

8. Whether the work is part of the regular business of the employer.[7]

Based upon all of the above, the Board determines for the purposes of the Workers Compensation Act (Act) that claimant should be considered an independent contractor. The Board notes claimant was performing at this establishment without any sort of compensation being provided by respondent. Claimant's only source of income came from the tips she generated from the customers. Respondent took out no state or federal taxes from her income, and the only control that respondent exercised over claimant was that she be available at the times scheduled and that she not violate any state or local laws while performing her dances.

While the Board acknowledges that there were certain fines which respondent would assess should claimant fail to appear, the evidence in this record indicates that these fines, while assessable, were not collectible as respondent had no way to deduct any funds from claimant, as she was not being paid for any of her dancing activities by respondent. Additionally, claimant was required to provide all of her tools, supplies and materials, or she could rent those from respondent. Finally, the Board notes claimant was not advised how to perform her dancing activities, other than being cautioned to obey the law.

[7] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

Applying the tests to determine an independent contractor relationship starts with the contractual licensing agreement which established claimant agreed to dance solely for gratuities given her by the customers. She was an entertainer and could conduct her dance routine in any fashion and in a costume of her own choosing. Claimant was responsible for her costume, music and her dance routine. And she was paid by the respondent's customers and did not receive any compensation from respondent.

Respondent contends that dancing is not an integral part of its business, arguing instead that its business is the furnishing of alcoholic beverages. While the Board understands that furnishing alcoholic beverages may provide the income to respondent, in these types of establishments, in many cases, it is the dancers that bring the patrons in the door. Furthermore, the record indicates that the dancers were encouraged to sell drinks by having the patrons buy them drinks. The Board rejects respondent's argument in this regard, but finds the overall weight of the evidence supports respondent's contention that claimant is an independent contractor for the purposes of the Act. The Board is mindful, as pointed out by the ALJ, that respondent required claimant wear an approved gown if she worked in the afternoon but otherwise claimant selected her own dance costumes. The Board, therefore, finds that the ALJ's Order awarding claimant benefits should be reversed.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated December 9, 2005, is reversed.

IT IS SO ORDERED.

Dated this 28th day of April 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the majority's opinion. We would find that claimant was, in fact, an employee of respondent and therefore entitled to benefits under the Act, K.S.A. 44-501, et. seq.

The majority's opinion ignores a very important provision of the Act: It is the intent of the legislature that the Act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the Act and to provide the protections of the Act to both. Once the parties are subject to the Act, that same statute mandates that the provisions of the Act "shall be applied impartially to both employers and employees in cases arising thereunder."[8]

It is clear from the facts of this case that respondent was doing everything it could to avoid the implications of the Act. Respondent entered into a contract, termed a "license agreement" that was, at best, illusory. This contract declared claimant to be an independent contractor. That same agreement "allowed" claimant to dance at respondent's establishment in exchange for no payments. Rather, claimant's pay was determined by the amount of tips she received, similar to waiters and waitresses. Claimant did not maintain an entertainment business of her own nor did she hold herself out to the public as an entertainer for hire. She worked only for respondent.

Although respondent was not paying claimant, it made certain demands of her. The record indicates that claimant was compelled to appear for work at certain times, not at her leisure. Failure to appear as scheduled would result in a monetary fine. Respondent "allowed" claimant to use her own music, equipment and dance costumes. She was, however, "allowed" to rent those items in the event she had none of her own. As noted by the majority, the decision of whether one is an employee or independent contractor is necessarily fact-driven. Under these facts, these members are persuaded that claimant was an employee. While the parties' agreement indicates it is a license agreement, the title of the document alone nor its declaration of claimant's status is not determinative.

These members believe claimant was providing an integral and inherent service to respondent's business. The purpose of the dancers is for entertainment and to encourage the consumption of alcohol. Even the majority recognizes this motivational factor. This is the very reason why respondent sets the schedule and controls their costumes so it can be assured that there are enough entertainers at the appropriate time and appropriately attired. The fact that respondent has music, a DJ and costumes available for rent also lends weight to this board member's factual conclusion. Those items are necessary to the

[8] K.S.A. 44-501(g).

dancers and if they don't have them they cannot perform, nor fulfill a need for respondent and its customers. Admittedly, respondent does not choreograph claimant's dance routines and there is an "individuality" or "distinct calling" to claimant's profession. But when the facts as a whole are considered, particularly in light of the mandates of K.S.A. 44-501(g), these members would find this claim compensable.

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BOARD MEMBER

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BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director